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IN THE MICHIGAN COURT OF APPEALS

ORDER

Re: People of MI v Matthew Scott English
Docket No. 235040
L.C. No. 00-002518-FH

Richard A. Bandstra, Chief Judge, acting under MCR 7.203(F)(1) and 7.21 6(A)(1 0), order:

The claim of appeal is DISMISSED for lack of jurisdiction because the judgment of sentence, which was based on a plea to a crime committed after December 27, 1994, is not appealable as a matter of right. MCR 7.203(A)(l)(b). See also 1994 PA 375, MCL 600.308(2)(d); MSA 27A.308(2)(d). As a result, the order in question is appealable to this Court only if leave is granted under MCR 7.205. See MCR 7.203(B)(l).

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on JUL 19, 2001

SEAL OF THE
MICHIGAN COURT
OF APPEALS

___/s/_____
Chief Clerk

STATE OF MICHIGAN
IN THE 31st CIRCUIT COURT FOR THE
COUNTY OF ST. CLAIR

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs. Case No. 00-25 1 8-FH
HON. JAMES P. ADAIR

MATTHEW SCOTT ENGLISH,
Defendant.

_____/

ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court, continued and held in the County Building, in the City of Port Huron, on this 22nd day of August, 2002.

On December 27, 2000, Defendant pled nolo contendere to two counts of Homicide Manslaughter - Motor Vehicle, contrary to MCL 750.321-E and to one count of Driving Felonious, contrary to MCL 752.191. The Court granted the prosecutor's motion to correct the February 20, 2001 sentence and on May 29, 2001, the Court re-sentenced Defendant to five years probation on terms and conditions including the first year in custody.

Defendant pled guilty to violating the terms and conditions of his probation on July 25, 2001. On August 7, 2001, this Court discharged Defendant from probation as a violator without improvement and sentenced him to a prison term of 72 to 180 months, with credit for 169 days previously served.

Defendant now brings this motion for relief from judgment pursuant to MCR 6.502 et.seq. The Court has reviewed Defendant's motion and supporting materials, as well as the file, records, transcripts and correspondence relating to the conviction. In particular, this Court has considered the Preliminary Examination

testimony of Casey Tucker, Gail Stevens, and William Trout. Ms. Stevens was an eyewitness to the accident and testified that Defendant's vehicle crossed the center line causing the accident. Sergeant Trout has been trained in accident reconstruction and testified that his evaluation and observation of the physical evidence was consistent with Ms. Stevens testimony. Sergeant Beach of the Michigan State Police also completed an accident reconstruction.

The Court notes that the attorney representing a defendant in a criminal case is given substantial latitude in making strategic and tactical choices respecting that representation.

Based upon the eyewitness testimony at the preliminary examination and the police testimony that the eyewitness version was consistent with the physical evidence and accident reconstruction, the Court finds Defendant's claim is without merit.

A review of the Plea transcript dated December 27, 2000 reveals that the Court advised the Defendant and the Defendant acknowledged that the plea would not be accepted if it was conditioned upon a specific sentence and that no one could promise the Defendant what his sentence would be. Defendant also acknowledged that the plea was voluntary.

The Court finds that Defendant has failed in his burden to establish "good cause" and "actual prejudice" from the alleged irregularities in support of his claim for relief. For these reasons, it plainly appears to the Court upon review of the materials that Defendant is not entitled to the relief requested. Therefore, Defendant's Motion for Relief from Judgment is DENIED.

SO ORDERED.

Dated: August 22, 2002

_____/s/_____
JAMES P. ADAIR,
Circuit Judge

COURT OF APPEALS, STATE OF MICHIGAN

ORDER

People of MI v Matthew S English — Donald S. Owens
Docket No. 243738 — Presiding Judge
LC No. 00-002518-FH

Donald E. Holbrook, Jr.
Patrick M. Meter, Judges

The Court orders that the application for leave to appeal is DENIED for lack of merit in the grounds presented.

_____/s/_____
Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on OCT 10, 2002

SEAL OF THE MICHIGAN
COURT OF APPEALS

_____/s/_____
Chief Clerk

ORDER
Entered: March 31, 2003

122547

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,
v
MATTHEW S. ENGLISH,
Defendant-Appellant.
_____/

Michigan Supreme Court Lansing, Michigan
Maura D. Corrigan, Chief Justice
Michigan F. Corrigan, Chief Justice
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman, Justices
SC: 122547
COA: 243738
St. Clair CC: 00-002518-FH

On order of the Court, the application for leave to appeal from the October 10, 2002 decision of the Court of Appeals is considered, and it is DENIED because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

SEAL OF THE MICHIGAN SUPREME COURT

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

March 31, 2003

_____/s/_____
Corbin R. Davis

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MATTHEW S. ENGLISH,
Petitioner,

v. Case No. 03-CV-73385-DT

SHERRY BURT,
Respondent.
_____/

OPINION AND ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Matthew S. English, a state prisoner currently confined at the Southern Michigan Correctional Facility in Jackson, Michigan, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254, asserting that he is incarcerated in violation of his constitutional rights. The matter is before the court on Respondent's motion for summary judgment seeking dismissal of the petition on the basis of procedural default. For the reasons set forth below, Respondent's motion will be granted and the petition for writ of habeas corpus will be dismissed.

I. FACTS

On December 27, 2000, Petitioner pleaded nolo contendere to two counts of vehicular manslaughter and one count of felonious driving in St. Clair County Circuit Court. The trial court initially granted Petitioner Youthful Trainee status and sentenced him to three years probation with the first 30 days to be served at the St. Clair County Jail, the next 120 days to be served at Huron House under house arrest, followed by Special Alternative Incarceration "boot camp" if

Petitioner was physically able, and other conditions. The prosecution subsequently filed a motion to correct sentence on the ground that Youthful Trainee status was only available following a guilty plea, which the trial court granted. On May 29, 2001 , the trial court re-sentenced Petitioner to five years of probation with the condition that he remain in custody during the first year of probation, including house arrest at Huron House and completion of Special Alternative Incarceration "boot camp", and other conditions.

Petitioner subsequently filed a claim of appeal with the Michigan Court of Appeals, which was dismissed for lack of jurisdiction because Petitioner did not have an appeal as of right from his plea-based conviction. *See People v. English*, Case No. 235040 (Mich. Ct. App. July 19, 2001).

On July 25, 2001, Petitioner pleaded guilty to violating the conditions of his probation. On August 7, 2001, the trial court discharged him from probation as a violator and sentenced him to 72 to 180 months imprisonment with credit for 169 days served.

On August 8, 2002, Petitioner filed a motion for relief from judgment in he state trial court asserting that trial counsel was ineffective for: (1) erroneously advising him that he qualified for Youthful Trainee status, and (2) failing to have an independent accident reconstruction evaluation conducted which could have exonerated him of the most serious charges. The trial court denied the motion finding that Petitioner had failed "to establish 'good cause' and 'actual prejudice' from the alleged irregularities in support of his claim for relief." *People v. English*, Case No. 00-2518-FH (St. Clair Co. Cir. Ct. Aug. 22, 2002). Petitioner filed an application for leave to appeal this decision with the Michigan Court of Appeals, which was denied "for lack of merit in the grounds presented." *People v. English*, Case No. 243738 (Mich. Ct. App. Oct. 10, 2002).

Petitioner also filed an application for leave to appeal with the Michigan Supreme Court, which was denied for failure "to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v. English*, 659 N.W.2d 234 (2003).

Petitioner, through counsel, filed his federal habeas petition on September 5, 2003, asserting that trial counsel was ineffective for failing to produce an independent accident reconstruction expert. On March 10, 2004, Respondent filed the instant motion for summary judgment seeking dismissal of the habeas petition on the basis of procedural default. On March 30, 2004, Petitioner filed an answer and brief in response to the motion.

II. DISCUSSION

The Antiterrorism and Effective Death Penalty Act of I 996 ("AEDPA"), codified at 28 U.S.C. 2241 et. seq., sets forth the standard of review that federal courts must apply when considering applications for a writ of habeas corpus raising constitutional claims. *See Wiggins v. Smith*, U.S., 123 5. Ct. 2527, 2534 (2003). The AEDPA applies to all habeas petitions filed after its effective date. *Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Because Petitioner instituted this action after the AEDPA's effective date, his case is governed by the AEDPA. As amended, 28 U.S.C. § 2254(d) imposes the following standard of review for habeas cases:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Petitioner claims that he is entitled to habeas relief because trial counsel was ineffective for failing to conduct accident reconstruction evaluation, which he claims would have exonerated him of the most serious charges against him. Respondent contends that this claim is barred by procedural default.

Federal habeas relief may be precluded on claims that a petitioner has not presented to the state courts in accordance with the state's procedural rules. *See Wainwright v. Sykes*, 433 U.S. 72, 85-87 (1977); *Couch v. Jabe*, 951 F.2d 94, 96 (6th Cir. 1991). A petitioner's procedural default in the state courts will preclude federal habeas review if the last state court rendering a judgment in the case rested its judgment on the procedural default. *Wainwright*, 433 U.S. at 85; *Coleman v. Mitchell*, 244 F.3d 533, 539 (6th Cir. 2001). in such a case, a federal court must determine not only whether a petitioner has failed to comply with state procedures, but also whether the state court relied on the procedural default or, alternatively, chose to waive the procedural bar. 'A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar."

Harris v. Reed, 489 U.S. 255, 263-64 (1989). The last explained state court judgment should be used to make this determination. *Ylst v. Nunnemaker*, 501 U.S. 797, 803-05 (1991). If the last state judgment is a silent or unexplained denial, it is presumed that the last reviewing court relied upon the last reasoned opinion. *Id.*

Here, the Michigan Supreme Court relied upon Michigan Court Rule 6.508(D) in denying Petitioner leave to appeal. That rule provides, in part, that a court may not grant relief to a defendant if the motion for relief from judgment alleges grounds for relief which could have been raised on direct appeal, absent a showing of good cause for the failure to raise such grounds previously and actual prejudice resulting therefrom. See Mich. Ct. R. 6.508(D). The state court's decision, while brief, was based upon an independent and adequate state procedural rule. *See Simpson v. Jones*, 238 F.3d 399, 407 (6th Cir. 2000). Although the Michigan Supreme Court did not fully explain its decision, the record indicates that Petitioner failed to raise this issue on direct appeal of his convictions despite the opportunity to do so.

A state prisoner who fails to comply with a state's procedural rules waives the right to federal habeas review absent a showing of cause for noncompliance and actual prejudice resulting from the alleged constitutional violation, or a showing of a fundamental miscarriage of justice. See *Coleman v. Thompson*, 501 U.S. 722, 753 (1991); *Gravley v. Mills*, 87 F.3d 779, 784-85 (6th Cir. 1996).

In this case, Petitioner neither alleges nor establishes cause to excuse his procedural default in failing to raise the ineffective assistance of trial counsel claim before the state courts on direct appeal of his convictions. A federal habeas court need not address the issue of prejudice when a petitioner fails to establish

cause to excuse a procedural default. *See Smith v. Murray*, 477 U.S. 527, 533 (1986); *Long v. McKeen*, 722 F 286, 289 (6th Cir. 1983).

Further, Petitioner has not established that a fundamental miscarriage of justice has occurred. The miscarriage of justice exception requires a showing that a constitutional violation probably resulted in the conviction of one who is actually innocent. *Schlup v. Delo*, 513 U.S. 298, 326-27 (1995). "' innocence' means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 624 (1998). Petitioner has made no such showing. At the August 25, 2000 preliminary examination, Petitioner's friend testified that Petitioner was using inhalants shortly before the accident, an eyewitness to the accident testified that she observed Petitioner's vehicle cross the center line and strike the other car, and police investigators trained in accident reconstruction opined that the physical evidence was consistent with the eyewitness testimony. The fact that defense experts may have offered testimony to counter the prosecution's evidence as to the circumstances of the accident does not establish Petitioner's actual innocence. Petitioner's claim is thus barred by procedural default and does not warrant habeas relief.

III. CONCLUSION

IT IS ORDERED that Respond motion for summary judgment [Dkt. # 4] is GRANTED.

/s/
ROBERT H. CLELAND
UNITED STATES
DISTRICT JUDGE

Dated: May 17, 2004

No. 04-1717

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT FILE

MATTHEW S. ENGLISH,	)	
	)	
Petitioner-Appellant,	)	
	)	
v.	)	**ORDER**
	)	
SHERRY BURT, Warden,	)	
	)	
Respondent-Appellee.	)	
	)	

Matthew S. English, a Michigan state prisoner, moves through counsel for a certificate of appealability and appeals a district court judgment dismissing his petition for a writ of habeas corpus, filed pursuant to 28 U.S.C. § 2254.

Upon consideration, the motion for a certificate of appealability is denied.

ENTERED BY ORDER OF THE COURT

_____/s/_____
Clerk